

Filed 12/14/16 Malbrue v. County of Los Angeles CA2/8

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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KYLE MALBRUE et al.,

Plaintiffs and Appellants,

v.

COUNTY OF LOS ANGELES
et al.,

Defendants and
Respondents.

B264115

(Los Angeles County
Super. Ct. No. BC501058)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elia Weinbach, Judge. Dismissed.

Jance M. Weberman for Plaintiffs and Appellants.

Houle & Houle, Richard J. Houle; Greines, Martin, Stein & Richland, Alison M. Turner and Carolyn Oill for Defendants and Respondents.

This appeal must be dismissed because the notice of appeal does not encompass the postjudgment order challenged on appeal.

BACKGROUND

We summarize only those facts relevant to whether this court has jurisdiction to consider the current appeal.¹ Kyle is the son of Tony Malbrue, who died while incarcerated.² On appeal, Kyle identifies both himself and Tony as appellants, though Tony is deceased. In the trial court, Kyle sued as an individual and as a successor to his father's estate.³ Kyle filed a first amended complaint against, among others, respondents the County of Los Angeles and former Sherriff Lee Baca asserting five causes of action including wrongful death. Respondents moved for summary judgment. In ruling on respondents' motion for summary judgment, the trial court refused to consider Kyle's expert's declaration because it was untimely. In January 2015, the court tentatively granted respondents' motion for summary judgment.

¹ Because we conclude that we lack such jurisdiction, we need not dwell on the deficiencies in the appellate record or Kyle Malbrue's failure to cite the record in violation of California Rules of Court, rule 8.204(a)(1)(C).

² We refer to Kyle by his first name to avoid any confusion with his father with whom he shares a surname. We intend no disrespect.

³ The case information sheet identifies Barbara Brown as the appellant. She is not further identified and is not identified as an interested party.

In February 2015, Kyle moved for relief from the judgment, citing Code of Civil Procedure⁴ section 473, subdivision (b) (section 473(b)). His counsel's declaration indicated that counsel failed "to properly anticipate the delays and obstacles that prevented timely filing" the expert's declaration.

On April 6, 2015, the court granted judgment in favor of respondents in accordance with its earlier order granting summary judgment.

On May 6, the trial court issued an order denying Kyle's motion for relief under section 473(b).

Kyle appealed from the "*judgment* after an order granting a summary judgment motion" entered on "April 6, 2015." (Italics added.)

Kyle filed an opening brief on appeal in which he argued that the trial court should have granted him relief from the judgment based on section 473(b) and his counsel's declaration of fault. Respondents argue that the notice of appeal did not include the postjudgment order denying Kyle relief under section 473. In his reply brief, Kyle correctly recognizes that a postjudgment order denying a section 473 motion to vacate is appealable. (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1394.)

DISCUSSION

A notice of appeal that omits reference to the judgment or order challenged on appeal is insufficient to confer jurisdiction on this court. (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 47; *Shiver, McGrane &*

⁴ All further statutory references are to the Code of Civil Procedure.

Martin v. Littell (1990) 217 Cal.App.3d 1041, 1045.) Although notices of appeal must be liberally construed, “it is well ‘beyond liberal construction’ to view an appeal from one order as an appeal from a ‘further and different order.’” (*Baker v. Castaldi* (2015) 235 Cal.App.4th 218, 225.) Because Kyle appealed only from the judgment, this court has no jurisdiction to consider the propriety of the subsequent order denying Kyle’s motion to vacate the judgment. (*Norman I. Krug Real Estate Investments, Inc. v. Praszker, supra*, at p. 47.) All of Kyle’s arguments on appeal concern the denial of relief under section 473.⁵ We therefore lack jurisdiction to consider the appeal and must dismiss it.

DISPOSITION

The appeal is dismissed. The parties shall bear their own costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.

⁵ The opening brief contains the following arguments: (1) “A motion for relief under California Code of Civil Procedure section 473(b) must be granted when plaintiff’s counsel submits an attestation of fault”; (2) “The trial court erroneously applied both the mandatory and discretionary provisions of the Code of Civil Procedure section 473 and [*sic*] when it denied plaintiff’s motion”; (3) “Relief under California Code of Civil Procedure section 473 is mandatory when there has been no litigation or adjudication on the merits”; (4) “The issue before this appellate court is to clarify section 473 statute and determine whether mandatory and/or discretionary provisions are applicable to motion for relief.” (Capitalization omitted.)